

ILLEGAL PRIVILEGE

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LEGAL PRIVILEGE IN ATTORNEY-CLIENT COMMUNICATIONS: INDIA

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1. INTRODUCTION

It is often remarked, never hide anything from your doctor and lawyer, but unfortunately, the conversations with your doctor may not get you the same level of privilege protection from law enforcement agencies and courts in India, the way it extends to that with your lawyer.

The attorney-client privilege or the rule of privilege is a critical legal concept that ensures that conversations between a client and their attorney are kept confidential and protected. This privilege covers not only conversations between attorney and their client, but also any documents or messages shared with attorneys when they are acting in their professional capacity.² The rule of privilege says that all the discussions of the client with the attorney should stay private, so one can get protected legal advice.³ The attorneys are not permitted, at any point, to disclose any confidential information/documents of the client without the express consent of the client. Further,

1 www.khaitanco.com.

2 Sweet & Maxwell, Phipson on Evidence (15th edition, paragraphs 20-05, 20-06), (2000).

3 Jones v. Great Central Railway Co. [1909] UKHL 1039 (02 April 1909).

the client cannot be coerced into divulging to the Court any confidential and privileged communication that he had with his attorney.⁴ The privilege commences post the attorney-client relationship is established, typically through an engagement letter or a verbal agreement.⁵

This concept of privileged communication has been debated and developed over time. In some jurisdictions, legal privilege is seen as a fundamental right,⁶ whereas in others, it is seen more as a procedural issue. However, not all conversations with an attorney can be protected by privilege.⁷ In today's world, where business and legal issues often cross borders, understanding how attorney-client privilege works in different jurisdictions becomes significant. The laws and rules about legal privilege in different parts of the world can be very different, making it complex for global corporations facing legal investigations in multiple countries.

This chapter aims at providing an understanding of legal privilege in India, by underscoring the significance of legal privilege within the legal framework, and covering significant issues and evolving standards in India. The chapter also discusses best practices for maintaining confidentiality, addressing common issues while presenting practical solutions, and emphasizing the importance of securely exchanging sensitive information within the ambit of legal privilege.

2. EVOLUTION OF THE JURISPRUDENCE OF THE ATTORNEY-CLIENT PRIVILEGE

The concept of attorney-client privilege dates back to the 16th century.⁸ Originally it was a principle that relied on the integrity of attorneys. This privilege was based on what is known as the “theory of attorney exemption”, where attorneys were morally bound by their profession’s oath and honor to safeguard their clients’ secrets. Consequently, by the end of the 18th century, a new perspective emerged, emphasizing client-focused confidentiality as the primary rationale for the attorney-client privilege.

4 Section 129, Indian Evidence Act, 1872.

5 *Kalikummar Pal v. Rajkumar Pal*, (1931)58 Cal 1379.

6 Stefanelli, Justine N., “*THE NEGATIVE IMPLICATIONS OF EU PRIVILEGE LAW UNDER ‘AKZO NOBEL’ AT HOME AND ABROAD*” *The International and Comparative Law Quarterly*, vol. 60, no. 2, 2011, pp. 545–56. JSTOR, <http://www.jstor.org/stable/23017013>.

7 Epstein, Edna Selan, “*A Modest Proposal to Address the Costs of the Attorney-Client Privilege*” *Litigation*, vol. 44, no. 3, 2018, pp. 16–20, JSTOR, <https://www.jstor.org/stable/27171276>.

8 Geoffrey C. Hazard Jr., *An Historical Perspective on the Attorney-Client Privilege*, *California Law Review*, vol. 66, no. 5, 1978, pp. 1061–91, available at- <https://doi.org/10.2307/3479905>.

This new justification focused on ensuring the client’s freedom to share their concerns with their legal advisor without fear. This shift marked the evolution of the modern attorney-client privilege.⁹ Over time, this privilege has evolved to cover all legal advice consultations.

Today, the debate surrounding attorney-client privilege isn’t whether it should exist or not, but rather what should be the scope of it. There is a widespread consensus that the rule of privilege should not be completely abolished, as doing so would entail significant consequences. Total abolition would mean that individuals accused in criminal cases would not be able to freely discuss their version of events with their attorneys without risking their conversations being disclosed to the prosecution. This would infringe upon a person’s right to legal counsel and their privilege against self-incrimination.¹⁰ The rule of privilege has now become an integral part of common law and is recognized worldwide.

3. THE SCOPE OF PRIVILEGE

In India, professional communications between attorneys and their clients are protected by a legal framework that includes the Indian Evidence Act of 1872, the Advocates Act of 1961 (“**Advocates Act**”), and the Bar Council of India Rules. Sections 126-129 of the Indian Evidence Act (“**Evidence Act**”) establish the common law principles governing professional communications between attorneys and clients. The rule of privilege also finds mention in the Code of Civil Procedure, 1908 and the Companies Act, 2013.¹¹

Section 126 of the Evidence Act provides protection for any communication between a client and their attorney, documents shared during their professional work, and advice given by the attorney. Such communication or document exchange should have taken place during the course, and for the purpose, of their engagement. Thus, legal advice is protected by privilege, and so are communications/documents prepared in anticipation of litigation.¹² However, when the advice given by the attorney to the client has no real or substantial connection to any law, the same would be considered non-legal

9 *Supra* note 8.

10 Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, Notre Dame Law Review (1999), available at- <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1960&context=ndlr>.

11 Order XI, Rule 19(2), Code of Civil Procedure, 1908.

12 *Larsen & Toubro Limited v Prime Displays (P) Ltd* (2003) 114 CompCas 141 (Bom); *Gurunanak Provisions Stores v Dulhonumal Savanmal and Ors*, AIR 1994 Guj 31.

communication, and would not be protected.¹³ It should be borne in mind that privilege does not extend to communications made in furtherance of any illegal purpose, or any communication that shows that crime was committed since the commencement of the attorney's employment.¹⁴

Section 129 of the Evidence Act provides protection for the client when it comes to the disclosure of private conversations that have taken place between them and their legal advisor. Generally, such conversations are not required to be revealed to the court, except if the client decides to testify in the case.

Under section 227 of the Companies Act, 2013, any privileged communication made to a legal advisor in their professional capacity is protected, with the exception of disclosing the name and address of the client. Such communications should not be disclosed to the Tribunal, the Central Government, the Registrar, or an inspector appointed by the Central Government. Additionally, section 23 of the Evidence Act protects admissions made by parties during negotiations referred to as 'without prejudice.' In such negotiations for settlement, parties agree not to disclose these admissions in court.¹⁵ This ensures that one party cannot use another party's admission against them during legal proceedings, promoting open and honest negotiations in pursuit of reaching settlements.

When an individual seeks advice from an attorney who is registered under the Advocates Act, an attorney-client privilege is established, and information during these interactions is protected under section 126 of the Evidence Act¹⁶. The attorney must be qualified to practice and be enrolled as an advocate under the Advocates Act, 1961 to invoke the privilege. Section 29 of the Advocates Act explicitly states that the practice of law in India is exclusively reserved for advocates, whereas section 2(a) of the Advocates Act precisely defines the term.¹⁷ Thus, non-attorneys, such as accountants and business consultants, do not fall under the umbrella of this privilege.¹⁸ However, if the attorney engages any external intelligence and/or forensic experts for the purposes of the legal case, then the privilege would extend to the work of these external experts as well.

13 *Municipal Corporation of Greater Bombay v Vijay Metal Works*, AIR 1982 Bom 6.

14 *Kameswara Rao v. Satyanarayana*, C.R.P Appeal No. 1357 of 1983 before Andhra Pradesh High Court (decided on 29 November 1983).

15 *Supra* note 13.

16 Section 126, Indian Evidence Act, 1872.

17 Section 2(a) of the Advocates Act, 1961 states that an "advocate" means an advocate entered in any roll under the provision of the Advocates Act, 1961.

18 *Id.*

In *Kalikummar Pal v. Rajkumar Pal*,¹⁹ it was held that privilege under section 126 of the Indian Evidence Act, 1872²⁰ applies exclusively once an attorney-client relationship has been established and does not extend to any period before such a relationship is formed. The attorney-client relationship is typically established when an individual or entity seeking legal representation formally engages the services of an attorney. This can occur through the signing of an engagement letter, which outlines the terms of the legal representation, responsibilities, and fees. Alternatively, it can be established through an oral agreement between the client and the attorney, where both parties agree to work together on a specific legal matter. In either case, this relationship is characterized by confidentiality and privilege, ensuring that the attorney can provide legal advice and the client can openly discuss their legal concerns, creating a foundation for effective legal representation. The Hon'ble Supreme Court of India, in the case of **V.C. Rangadurai v. D. Gopalan**²¹, has also held that if an attorney discerns a potential conflict of interest when taking on a new client, they should refrain from accepting the case if it goes against the interests of their previous client. This legal principle emphasizes that breaching the fiduciary duty that arises from the attorney-client relationship constitutes misconduct and a conflict of interest.

Interestingly, in *Tamil Nadu Information Commission and M Sivaraj*²², it has been held that even public prosecutors are unequivocally bound by legal privilege under section 126 of the Evidence Act, and parties seeking information relating to the state must approach the state government itself, as public prosecutors cannot disclose such information.

19 *Kalikummar Pal v. Rajkumar Pal* (1931)58 Cal 1379.

20 Section 126, Indian Evidence Act, 1872.

21 *V.C. Rangadurai v. D. Gopalan* (1979) 1 SCC 308.

22 2010 (5) CTC 238.

4. COMMUNICATIONS WITH IN-HOUSE COUNSEL

In-house counsels in India do not enjoy the same legal privilege as external attorneys. Professional communications between an in-house counsel and officers, directors and employees of a company are also not protected as privileged communications between an attorney and the client.²³

The Evidence Act recognizes barristers, attorneys, pleaders, or vakils but does not explicitly include the in-house counsel. Section 2(a) of the Advocates Act defines an advocate as someone who is registered with the State Bar Council. Attorneys in India who become full-time employees of a company are generally required to surrender their license.²⁴ In such cases, the legal privilege afforded to external attorneys do not apply, as they are considered to be the employees of their respective company. However, if an in-house counsel retains their advocate status and continues to provide legal advice, then legal privilege becomes a subjective analysis, depending on factors such as the content of communication and the nature of their employment.

The Supreme Court in ***Satish Kumar Sharma v. Bar Council of Himachal Pradesh***²⁵ has held that if a full-time employee of a company does not represent the employer or engage in advocacy but is required to do other kinds of functions, they lose their advocate status, becoming mere employees without legal privilege. In line with this, various High Courts in India have suggested that in-house counsels should be granted legal privilege for legal communications with their employer, provided the discussions pertain to legal advice or potential litigation and not administrative or executive matters.²⁶ Thus, based on judicial precedents, communications between an attorney and a corporate client's employees, communicating on behalf of, and seeking legal advice for the company, would be protected by privilege, however, the in-house counsel's communication with a corporate client's employees would only be protected by privilege if it pertains to legal advice or potential litigation.

Usually, to circumvent the ambiguity in the law, the employment contracts of in-house counsels in India usually contain a confidentiality clause which shields any information disclosed by the employees/directors of the company to the in-house counsel during the course of his/her employment.²⁷

23 Susmit Pushkar and Bhavna Mishra, *GIR privilege Know-How 2020, India Chapter*, available at <https://globalinvestigationsreview.com/insight/know-how/privilege/report/india>.

24 Part VI, Chapter II, Section VII, Rule 49 of the Bar Council of India Rules.

25 AIR 2001 SC 509.

26 *Municipal Corporation of Greater Bombay v Vijay Metal Works*, AIR 1982 Bom 6; *Larsen & Toubro Ltd v Prime Displays (P) Ltd*, [2003] 114 Comp Cas 141 (Bom).

27 *Supra* note 21.

5. EXCEPTIONS AND WAIVER TO THE ATTORNEY-CLIENT PRIVILEGE

The Indian legal landscape surrounding attorney-client privilege is characterized by a delicate interplay of exceptions and the concept of waiver. These exceptions, clearly defined in section 126 of the Evidence Act, delineate the boundaries of the legal safeguard, underlining that it does not extend to communications involving illegal activities. Additionally, the pivotal concept of waiver takes center stage, with express and implied forms offering clients different paths to relinquish their privilege. While express waiver necessitates clear and explicit client consent, implied waiver relies on a nuanced interpretation of a client's actions. This intricate legal framework seeks to strike a balance between safeguarding confidentiality and addressing potential misuse of attorney-client privilege.

5.1 EXCEPTIONS TO THE ATTORNEY-CLIENT PRIVILEGE IN INDIA:

The provisos under section 126 of the Evidence Act enumerate the exceptions to the rule of privilege. Any communications made in furtherance of an illegal purpose or any fact coming to the knowledge of the attorney since the commencement of his employment showing that any crime or fraud has been committed are not protected. It is settled law that illegal purpose prevents the privilege from attaching.²⁸

Further, in *Memon Hajee Haroon vs. Abdul Karim*²⁹, it has been held that that in order to claim privilege under section 126 of the Evidence Act, information must be “confidential” in nature. Thus, information obtained from a non-privileged source is not protected by attorney-client privilege, even though the said information could also be part of the attorney-client communication. If the underlying information is available with third parties, such third parties not bound by the attorney-client relationship can be compelled to tender evidence as regards the underlying information.³⁰

Communication of legal advice to accountants and auditors, for instance, may not be protected by privilege. However, as per section 127 of the Evidence Act, interpreters and clerks or servants of the attorney can be privy to the communication without breaking privilege.

Also, as mentioned before, privilege doesn't attach to a communication made before the creation of an attorney-client relationship.

²⁸ *Supra* note 9.

²⁹ [1878] 3 Bom. 91.

³⁰ *Supra* note 21.

5.2 WAIVER AND TERMINATION OF ATTORNEY-CLIENT PRIVILEGE IN INDIA:
In India, legal privilege does not terminate on the death of either the attorney or client, or by the termination of the litigation. However, once the client, either expressly or impliedly, waives the privilege, the privilege is considered terminated.³¹

The concept of waiver assumes a pivotal role, with two distinct forms: express and implied.³² In India, the privilege is the privilege of the client and not of the attorney. The attorney is bound by that privilege, unless waived by the client.

Section 126 of the Evidence Act is the legal provision that permits the waiver of attorney-client privilege, stipulating the need for the “express consent” of the client. However, despite this statutory framework, there is limited jurisprudence in India that provides clarity on the scope of waiver, particularly in cases where express consent is absent, leaving room for legal ambiguity and debate.³³ The crux revolves around establishing a clear and unequivocal intent to waive the privilege.

In contrast, implied waiver can be inferred from a client’s conduct or actions that manifest an intention to waive the privilege. Such consent can be inferred from the facts and circumstances of each case. Such situations may arise when clients seek legal advice in the presence of third parties or if the client discloses information to third parties. However, privilege will not be considered waived if the attorney makes an inadvertent disclosure. If an inadvertent disclosure is made, the attorney can request the recipient to delete any copies of the privileged communication inadvertently disclosed to a third party or request return of the privileged material. The attorney can put the third party to notice regarding the privileged and confidential nature of the information and liability in the case of misuse of privileged information.³⁴

Further, Section 128 provides for waiver of privilege if the client questions his own attorney in any court proceedings regarding disclosures which he would otherwise not be at liberty to disclose. Section 129 provides for waiver of privilege if the client volunteers himself as a witness, and the court believes that disclosure of any privileged communications with the attorney are important to explain evidence provided by such client in the proceedings.

31 *Supra* note 21.

32 *Kanchan Udyog Ltd. v. United Spirits Ltd.*, (2017) 8 SCC 237.

33 *Bernad Thattil v. Ramachandran Pillai*, 1987 Cri LJ 739.

34 *Supra* Note 21.

6. CONCLUSION

Despite relatively limited discussions and legal precedent surrounding attorney-client privilege in the Indian context, this rule of privilege remains a crucial and formidable shield for protecting individuals and their confidential legal communications. While the attorney-client privilege is recognized in Indian law, its application and nuances are often subject to ambiguity and inconsistency. The Indian Evidence Act, 1872, provides some protection for attorney-client communications, but the rules lack specific guidelines, leading to uncertainty. Overall, the development of attorney-client privilege in India is ongoing, and addressing the nuances and gaps in its application is essential for a more robust and consistent legal framework.

THE LEGAL PRIVILEGE

The internationalisation of society is also noticeable in the legal practice. Lawyers from different countries are increasingly working together in, for example, criminal cases, because investigative authorities from different countries are also increasingly cooperating with each other. But what about legal privilege in the country of origin of fellow lawyers? Is communication with the client sufficiently guaranteed in such cases?

This book is intended for lawyers, their clients and other interested parties. Experts across the globe explain the rules regarding legal privilege in the country in which they practise law.

If you are missing a chapter on legal privilege in your own country and would like to contribute to the next edition of this book, please email us at book@thelegalprivilegeuncovered.com.